

<b>ANGELA J. KIDWELL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 250,852
<b>ADVANCED HOME DESIGNS, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>AMERICAN FAMILY MUTUAL INS. CO.</b>	)	
Insurance Carrier	)	

Claimant appeals from a preliminary hearing decision entered by Administrative Law Judge Robert H. Foerschler on March 8, 2000.

The Administrative Law Judge found claimant was a self-employed independent contractor not covered by the Workers Compensation Act and on that basis denied the application for preliminary benefits.

After reviewing the record and considering the evidence, the Appeals Board concludes the Order should be affirmed.

Claimant is a siding applicator who was injured while performing work for Advanced Home Designs. The facts defining the relationship, facts indicating whether claimant was an independent contractor or an employee, show that claimant had worked on five jobs for respondent over an approximately 13-week period. Respondent sold the siding and then contracted with claimant and others to apply the siding. For each job respondent asked claimant to sign an agreement. The agreement provided that claimant was a subcontractor, not an employee. Under the agreement, the subcontractor was to hire its own workers, makes its own schedule, follow its own work procedures and methods, and make all other decisions regarding installation except as provided in paragraph 6. Paragraph 6 required the subcontractor to perform the work in a good and workmanlike fashion and to do the work on a schedule agreeable to the property owner. Claimant was paid by the square. Respondent provided the materials, but claimant provided her own tools. Respondent did not withhold taxes. Respondent did designate as a tool rental a percentage of the amount it paid claimant. Claimant testified that respondent's representative, Bonnie Baker, would visit the job site and if claimant was doing something wrong, she would have to modify what she

was doing to correct it. Claimant testified that in her opinion respondent could fire her if she was not doing things properly. Respondent told claimant she would have to provide her own workers compensation insurance and advised that if she did not, respondent would withhold 17 percent of the amount respondent would otherwise pay claimant to pay for workers compensation insurance. Claimant did not provide her own insurance, and respondent withheld the 17 percent. During the period claimant was performing work for respondent, claimant also did a siding job for at least one other person or entity.

The day claimant was injured, claimant had just started a new job for respondent. No contract had been signed. In fact, respondent had not talked to claimant about the job. Instead, Darrell Tucker had called respondent to see if respondent had any jobs. Darrell Tucker generally did work for claimant. In particular, he assisted with the loading and unloading. Bonnie Baker testified she had also seen Darrell Tucker doing some of the siding. When Darrell Tucker called, Bonnie Baker told him respondent did have a job, the Griffin job. Bonnie Baker assumed Tucker was speaking for claimant. On prior occasions, Baker had talked to Tucker because he had been the one making arrangements to pick up the materials. But on other occasions the claimant had signed the contract. Baker thought the contract may have been signed by both on one occasion. Baker had made the checks payable to claimant. Baker had tried to meet with claimant and Tucker to get a signature but the contract had not been signed at the time of claimant's accident.

Bonnie Baker agreed she would visit the job site. According to her, she would see if the job was being done in a timely fashion. Baker visited with the homeowner if they had questions and spent time with the installer if the installer had questions about the scope of the job. At the end of the job, Baker prepared a pay sheet for respondent's owner. The owner reviewed the sheet and authorized payment.

In the Board's view, the above-recited facts are more indicative of an independent contractor relationship than an employer-employee relationship. Although the written contract had not been signed for the job claimant was doing at the time of the accident, the Board concludes, based on their consistent practice, the parties expected the usual contractual relationship. Under Kansas law, the right to control the manner or method of performing the work is the primary test used to define the relationship. *Evans v. Board of Education of Hays*, 178 Kan. 275, 284 P.2d 1068 (1955). Although claimant testified respondent could correct claimant's work, this testimony is offset by provisions of their standard written agreement. That agreement gives claimant significant control.

Other factors may also be considered. *McCarty v. Great Bend Board of Education*, 195 Kan. 310, 403 P.2d 956 (1965). In this case, most of those factors suggest the independent contractor relationship. Claimant provided her own tools. Claimant hired and paid another person to assist her. Claimant would have had the option to turn down any given job and could do work for others.

Claimant has argued, in part, that respondent should not be permitted to deduct from claimant's pay for workers compensation insurance and then deny that claimant comes under the Act. This case demonstrates the difficulty created by the uncertainty in the tests used to determine whether the claimant is an employee or an independent contractor. The uncertainty leaves both parties to the transaction unable to predict how the court will ultimately categorize the relationship

and, as a result, uncertain about their respective rights and obligations under the Workers Compensation Act. As pointed out in *Larson's Workers' Compensation Law*, Sec. 61.02, the right to control, although often described as the primary test, is often the most difficult to demonstrate. It is, in many circumstances, a vague standard.

In some states, the purchase of insurance coverage is considered to control or override other factors. *Larson's Workers' Compensation Law*, Sec. 63.04. Such a rule helps bring certainty and assigns responsibility where there will be coverage. The respondent is then estopped from denying claimant was its employee. The parties' agreement is enforced in the workers compensation proceedings. The Board might agree with enforcing a clear promise to provide coverage as an employee.

But in this case, it is not clear that respondent was promising to provide workers compensation coverage for claimant as its employee. The written agreements required claimant to purchase workers compensation insurance as a subcontractor and stated claimant would not be covered by respondent's insurance. This portion of the written agreement was verbally modified. Respondent advised claimant that if claimant did not purchase the insurance, respondent would withhold money to purchase insurance. It appears that if respondent purchased insurance it could, and would most consistent with the written agreement, have been for claimant as an independent contractor, either to cover claimant as a self-employed independent contractor pursuant to election under K.S.A. 44-542a or to cover claimant's employees. If the agreement were enforced, claimant would be the one the claim would be against with the claim paid by insurance respondent had paid for out of the money withheld. There is no indication insurance was ever purchased. This leaves a contract question which, as the ALJ pointed out, is outside the Board's jurisdiction. See, e.g. *Superior Insurance Company v. Kling*, 327 S.W. 2d 422 (Tex. 1959).

For these reasons, the Board concludes the decision by the Administrative Law Judge should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing decision entered by Administrative Law Judge Robert H. Foerschler on March 8, 2000, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2000.

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BOARD MEMBER

c: Michael R. Wallace, Shawnee Mission, KS  
Joseph R. Ebbert, Kansas City, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director